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No. 04-1216

IN THE

Supreme Court of the United States

SAGE HOSPITALITY RESOURCES, LLC,

Petitioner,

v.

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 57,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE,* AND BRIEF *AMICI CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., FAITH JETTER, AND DAVID HARLICH IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

The National Right to Work Legal Defense Foundation, Inc. ("Foundation"), Faith Jetter, and David Harlich hereby move

for leave to file the accompanying brief as *amici curiae* in support of the Petitioner.[1] The Foundation is a charitable, legal aid organization formed to protect the Right to Work, freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. The Foundation's staff attorneys have served as counsel to individual employees in many Supreme Court cases involving employees' rights to refrain from joining or supporting labor organizations. These cases include *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Most recently, the Foundation's legal aid program has been at the forefront of exposing the true nature of so-called "neutrality and card check" agreements, which are the subject of this litigation. *See Dana Corp.*, 341 N.L.R.B. No. 150, 2004 WL 1329345 (2004); *Patterson v. Heartland Indus. Partners, LLP*, 225 F.R.D. 204 (N.D. Ohio 2004).

Faith Jetter and David Harlich ("Employees") are employed by the Petitioner, Sage Hospitality Resources ("Sage"), working as a housekeeper and bartender, respectively. The "neutrality and card check" agreement which the City of Pittsburgh forced upon Sage grants the Hotel Employees and Restaurant Employees Union, Local 57 ("HERE") several exclusive privileges and powers that enable it—above all other unions—to become the Employees' collective bargaining representative. By filing the accompanying brief as *amici curaie*, Employees Jetter and Harlich seek to protect their right to refrain under § 7 of the National Labor Relations Act, 29 U.S.C. § 157.

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[1] *Amici* sought the consent of all parties to file this brief. Petitioner granted its consent, but Respondent refused.

For these reasons, the *Amici* respectfully move for leave to file the accompanying brief in support of the Petitioner.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., FAITH JETTER, AND DAVID HARLICH IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI*[1]

The Foundation is a charitable, legal aid organization formed to protect the Right to Work, freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. As such, the Foundation aids employees who have been denied or coerced in the exercise of their right to refrain from collective activity. The Foundation's staff attorneys have served as counsel to individual employees in many Supreme Court cases involving employees' right to refrain from joining or supporting labor organizations, and thereby have helped to establish important precedents protecting employee rights in the workplace against the abuses of compulsory unionism. These cases include: *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

Most recently, the Foundation's legal aid program has been at the forefront of exposing the true nature of so-called "neutrality and card check" agreements. *See Dana Corp.*, 341 N.L.R.B. No. 150, 2004 WL 1329345 (2004); *Patterson v. Heartland Indus. Partners, LLP*, 225 F.R.D. 204 (N.D. Ohio

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[1] *Amici* state that this brief was not prepared, written, or produced by any person or entity other than the *Amici* or their counsel, pursuant to Supreme Court Rule 37.6.

2004). Under these agreements, employers and unions strike secret deals to herd employees into unionization, often waiving National Labor Relations Board ("NLRB")–supervised secret–ballot elections and pressuring employees into signing union authorization cards which are counted as "votes" in favor of unionization. These agreements strike at the heart of employees' § 7 right to choose unionization or to *refrain*. The Foundation and its supporters want to ensure that this Court, as it considers the instant Petition for Writ of Certiorari, understands the manner in which these "neutrality and card check" agreements are created, enforced, and abused to hinder employees in the exercise of their § 7 rights.

Faith Jetter and David Harlich ("Employees") are employed by the Petitioner, Sage Hospitality Resources ("Sage"), working as a housekeeper and bartender, respectively. The "neutrality and card check" agreement which the City of Pittsburgh forced upon Sage grants Hotel Employees and Restaurant Employees Union, Local 57 ("HERE") several exclusive privileges and powers that enable it—above all other unions—to become the Employees' collective bargaining representative. Although the agreement recites that its purpose is to "ensur[e] an orderly environment for the exercise by the Employees of their rights under Section 7 of the National Labor Relations Act ("NLRA")," (Memorandum of Agreement, ¶ 2),[2] Employees Jetter and Harlich assert that the true nature and effect of this agreement is to suppress their § 7 right to refrain from unionism, and foist upon them a union which they do not support—all without an NLRB-supervised secret-ballot election in which they and their co-workers are given the chance to vote their consciences in private.

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[2]The Memorandum of Agreement between Sage and HERE is reproduced as Appendix G to Sage's Petition for Writ of Certiorari.

When this case was before the Third Circuit, Employees Jetter and Harlich filed a Motion to Intervene, which was denied. Nevertheless, the Employees still want their § 7 rights protected from schemes to foist HERE upon them. They wish to hear all sides of the story regarding HERE and its background and purposes, and do not want their employer silenced. They feel unfairly targeted by HERE's "card check" process, which counts the signing of a union authorization card as a "vote" in favor of the union. Most importantly, the Employees fervently desire the freedom to choose a union—*or refrain therefrom*—through the NLRB's secret-ballot election process.

Neither the City of Pittsburgh, Sage, nor HERE asked these Employees if they wished to be grist for a "neutrality and card check" agreement covering their unionization. Yet, the city ordinance and the agreement limit what employees can be told about the union, provide HERE with their home addresses and personal information, and eliminate their ability to vote their consciences in private in a secret–ballot election. By filing the accompanying *amici* brief, Employees Jetter and Harlich seek to protect these crucial interests under § 7 of the NLRA.

QUESTION PRESENTED

The *Amici* hereby adopt and incorporate by reference the Petitioner's Question Presented.

STATEMENT OF THE CASE

The *Amici* hereby adopt and incorporate by reference the Petitioner's Statement of the Case.

SUMMARY OF THE ARGUMENT

This Court has recognized that the paramount purpose of the federal labor law system is "voluntary unionism," to provide employees with the right to choose or reject union representation. *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985). The "neutrality and card check" arrangements at issue in this case are not favored by federal labor policy, for they hinder employees' § 7 right to choose or reject a union. These neutrality and card check arrangements prevent employees from hearing both sides of the story about unionization, by placing a gag on employer speech. These arrangements give unions access to employees' home addresses and other personal information, thereby opening employees to abusive "home visits" and other union pressure. Finally, these arrangements waive government-supervised secret-ballot elections, and thereby increase the chances that employees will be coerced into signing union authorization cards which are counted as "votes" for the union. Usually negotiated in secret by unions that covet new members and employers that covet "labor peace," these neutrality and card check arrangements do not enhance the § 7 interests of the employees.

REASONS FOR GRANTING THE PETITION

I. The "Neutrality and Card Check" Agreement Mandated by the City of Pittsburgh Ordinance Destroys, Rather Than Enhances, Employees' § 7 Rights.

A. Introduction.

The Petitioner has demonstrated that the Third Circuit's ruling is erroneous and conflicts with the decisions of this Court. *See Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986);

see also Chamber of Commerce v. Lockyer, 364 F.3d 1154 (9th Cir. 2004) (Petition for Rehearing pending). This Court's review is needed to ensure that state and local governments such as the City of Pittsburgh do not interfere with the federal labor law system crafted by Congress. The City of Pittsburgh ordinance must be held preempted because of its heavy-handed interference with private labor relations matters best left to the NLRB and the free flow of economic forces. *See, e.g., Wisconsin Dep't of Industry, Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986).

Thus, the *Amici* adopt the Petitioner's well-crafted arguments concerning the preemption issue, and will not repeat them here. Instead, *Amici* will focus on the fact that so-called "neutrality and card check" agreements, like the one that the City of Pittsburgh foisted upon Sage, destroy employees' § 7 right to freely choose *or reject* a labor union. As such, HERE has no basis to argue that such agreements enhance employee freedom of choice or are "favored" by federal labor policy.

The Third Circuit refused to take employees' § 7 interests into account when it held that this neutrality agreement "benefits *both parties* [Sage and HERE] with efficiency and cost saving." *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206, 219 (3d Cir. 2004). The court of appeals rejected the Motion to Intervene filed by Employees Jetter and Harlich, and further rejected Sage's effort to raise the employees' § 7 interests, holding that Sage lacked standing to assert any rights of its employees that may be infringed under the agreement. *Id.* Thus, since employees were not parties in the underlying litigation, their interests in challenging neutrality and card check agreements were neither considered nor protected by the court below.

B. Governmental Entities Mandate Neutrality and Card Check Agreements in Order to Curtail Employees' § 7 Right to Refrain.

This Court has recognized that the paramount purpose of the federal labor law system is "voluntary unionism," to provide employees with the right to choose *or reject* union representation. *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985); *see also Bloom v. NLRB*, 153 F.3d 844, 849-50 (8th Cir. 1998) (citations omitted), *vacated on other grounds sub nom. OPEIU Local 12 v. Bloom*, 525 U.S. 1133 (1999) ("Enlisting in a union is a wholly voluntary commitment; it is an option that may be freely undertaken or freely rejected."). But, as will be shown below, neutrality and card check agreements subvert employees' right to voluntary unionism by, *inter alia*, imposing arbitrary limits on what they can hear from their employer, allowing unions to pressure and coerce employees into signing union authorization cards, and eliminating the right to an NLRB-supervised secret–ballot election in which employees can vote their consciences in private.

Precisely because these neutrality and card check agreements limit employee freedom of choice and thereby grease the skids for an anointed union to gain exclusive representation rights, state and local governments have shown an increasing penchant for mandating them. *See, e.g., Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, ____ F. Supp. 2d ____, No. 01-C-0149, 2005 WL 433139 (E.D. Wis. Feb. 11, 2005); *Aeroground, Inc. v. City & County of San Francisco*, 170 F. Supp. 2d 950 (N.D. Cal. 2001); *Chamber of Commerce v. Lockyer*, 364 F.3d 1154 (9th Cir. 2004).

Unions rely upon government officials to mandate neutrality and card check agreements because they face a steady decline in the number of employees voluntarily choosing union

representation when given a free choice in a secret-ballot election. Financial self-interest has driven unions to search for new ways, often underhanded, of acquiring dues paying members.[3] The AFL-CIO's General Counsel has written that unions should "use strategic campaigns to secure recognition . . . outside the traditional representation processes." Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, Lab. L.J., Summer/Fall 1996, at 176. By design, employees have fewer legal protections "outside the traditional representation processes," and thus little possibility of protecting their rights under § 7 to resist the union organizing campaigns targeting them. *See, e.g., Dana Corp.*, 341 N.L.R.B. No. 150, 2004 WL 1329345 (2004); NLRB General Counsel Arthur Rosenfeld's Report on Recent Case Developments, No. R-2544, Nov. 17, 2004, http://www.nlrb.gov/nlrb/press/releases/r2544.pdf.

The use of "card checks" and the waiving of secret-ballot elections inevitably lead to an increase in union coercion and intimidation, as employees are pressured into signing authorization cards that are counted as "votes" for unionization. This Court has long recognized the illicit pressures that unions

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[3]The facts are well known: most unions are desperate for new dues paying members. In 2003, 12.9% of wage and salary workers were union members, down from 13.3% in 2002, according to the U.S. Department of Labor, http://www.bls.gov/news.relase/union2.nr0.htm (Jan. 21, 2004). The number of persons belonging to a union fell by 369,000 in 2003, to a total of 15.8 million. The union membership rate has steadily declined from a high of 20.1 % in 1983, the first year for which comparable union data is available. For example, in 1982, the Steelworkers union claimed 1.2 million members, but by 2002 the number was 588,000. In 1982, the United Auto Workers claimed 1.14 million members, but by 2002 only 700,000. As of today, only 8.2% of the private sector workforce is unionized, and the other 91.8% does not appear to be flocking to join. *IBM Corp.*, 341 N.L.R.B. No. 148, at 19 n.9. 2004 WL 1335742, at *18 n.9 (2004).

can bring to bear against employees who refuse to sign a union authorization card. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 306 (1974) (there exists "rational, good-faith grounds for distrusting authorization cards"); *id.* at 315 n.5 (Stewart, J., dissenting) (recognizing "the possibility of undue peer pressure or even coercion in personal card solicitation"); *see also NLRB v. Gissel Packing Co.*, 395 U.S. 575, 601-10 (1969). These pressures are magnified when employees are subjected to a neutrality and card check agreement that they neither sought nor approved.

In short, state and local governments and their allies in the union movement advocate "neutrality and card check" not because they enhance employees' rights under § 7, but because they limit those rights and hinder every employee who wishes to exercise his or her right to refrain from unionization.

C. Provisions Common to Most Neutrality and Card Check Agreements Limit Employee Freedom of Choice and Thereby Harm the Principle of Voluntary Unionism Embedded in § 7.

In a recent speech to the American Bar Association, NLRB Chairman Robert Battista criticized the growing use of neutrality agreements and stated that the "purpose of using neutrality agreements is not to expedite [employee free choice], but to silence one of the parties." Daily Lab. Rep., *Five Members Discuss Decisionmaking, Wide Variety of Issues at ABA Meeting*, Aug. 15, 2003, at B-1. He was correct, as demonstrated by these common "neutrality" provisions that limit what employees can hear from their employer and hinder employees' § 7 right to freely choose or reject unionization.

1) Gag rule: Although most neutrality agreements purport to require the employer to remain "neutral," in reality

they impose a gag on all speech not favorable to the union. Even front-line supervisors are prohibited from saying anything about the union or unionization during an organizing drive. Employees are only permitted to hear one side of the story: the version the union officials want them to hear.

The Memorandum of Agreement between Sage and HERE, ¶ 4, states that SAGE may not "do any action or make any statements that will directly or indirectly state or imply opposition by the Employer." But what does this clause really mean? In practice, it requires Sage to refuse to provide even truthful information in response to direct employee questions about HERE and its motives and history.

For example, in 1985, the President's Commission on Organized Crime found that HERE's international affiliate "has a documented relationship with the Chicago "Outfit" of *La Cosa Nostra* at the international level and subject to the influence of the Gambino, Colombo, and Philadelphia *La Cosa Nostra* families at the local level." *The Edge: Organized Crime, Business and Labor Unions*. But what if an employee learns of this sordid history and asks Sage about it and its impact on the union's current structure and intentions? The neutrality agreement mandated by the City of Pittsburgh prevents Sage from responding truthfully to employee questions both about HERE's past criminal activities and its current purposes and motivations. *Service Employees Int'l Union v. St. Vincent Med. Center*, 344 F.3d 977 (9th Cir. 2003) (union alleges various employer speech violates the neutrality agreement); *International Union, UAW v. Dana Corp.*, 697 F.2d 718 (6th Cir. 1983) (same); *International Union, UAW v. Dana Corp.*, 278 F.3d 548 (6th Cir. 2002)

(same). Such limitations on employer free speech are intentionally designed to squelch debate and keep employees in the dark about the history and motives of the union that covets them.[4]

Indeed, the Ninth Circuit in *Lockyer* recognized that such state-enforced limits on the dissemination of truthful information cannot survive a preemption challenge because "an overriding principle of the NLRA is that the collective bargaining process cannot function unless *both employers and employees* have the ability to engage in open and robust debate concerning unionization." *Chamber of Commerce v. Lockyer*, 364 F.3d 1154, 1166 (9th Cir. 2004); *see also Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("The right . . . to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly.").

Neither the City of Pittsburgh nor any other governmental entity has a legitimate interest in halting the employer's and employees' exchange of truthful information about HERE or any other union. Indeed, § 8(c) of the NLRA, 29 U.S.C. § 158(c), was designed to "implement[] the First Amendment," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), and thereby encourage such exchanges of truthful information, not squelch them. Housekeepers, cooks, and bartenders seeking truthful information about a particular union and the effects of unionization in their workplace are entitled to truthful answers from their employer and a full debate, not rote incantations of "we do not oppose the union, and we can say nothing else by order of the City of Pittsburgh." Employer silence extracted by a union and

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[4]The idea that union officials act in their own self-interest, even committing crimes to do so, is not far-fetched. *Arroyo v. United States*, 359 U.S. 419 (1959) (union official accepted bribes from management); *United States v. Ryan*, 350 U.S. 299 (1956) (same).

enforced by a local government does not enhance the employee's ability to make a free and informed decision under § 7. Instead, by purposefully keeping employees in the dark and limiting all debate, these union and city-imposed gag rules prevent the free flow of ideas that are critical to informed decision making and employee freedom of choice.

2) Union access to employees' personal information and employers' premises: The neutrality agreement foisted upon Sage by the City of Pittsburgh requires the employer to provide the anointed union, HERE, with personal information about the targeted employees, including home addresses and phone numbers. Sage's employees were never asked to consent to the release of their personal information. HERE was also given permission to enter company property during work hours to solicit employee support and collect union authorization cards, even though unions normally have very limited rights of access to employer premises. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

Armed with broad access to employees in both their homes and workplaces, unions subject employees to relentless group pressure to sign authorization cards. Faith Jetter has attested to this coercion in the sworn Declaration that she filed with the Third Circuit in support of her Motion to Intervene.

> Despite the fact that I had told the union representatives of my decision to refrain from signing the card, I felt like there was continuing pressure on me to sign. These union representatives and others were sometimes in and around the hotel, and would speak to me or approach me when I did not want to speak with them. I also heard from other employees that the union representatives were making inquiries about me, such as asking questions about my work performance. I found this to be an

> invasion of my personal privacy. Once when I was on medical leave and went into the hospital, I found that when I returned to work the union representatives knew about my hospitalization and my illness. I felt like their knowledge about me and my illness was also an invasion of my personal privacy.

Sadly, these sorts of pressure tactics are the stock-in-trade of union organizers intent on procuring signatures from fearful or unsuspecting employees. In another recent NLRB case concerning the enforcement of a neutrality agreement, an employee subject to a UAW "card check" drive attested as follows:

> The UAW put constant pressure on some employees to sign cards by having union organizers bother them while on break time at work, and visit them at home. I believe that the UAW organizers also misled many employees as to the purpose and the finality of the cards. Overall, many employees signed the cards just to get the UAW organizers off their back, not because they really wanted the UAW to represent them.

Declaration of Clarice K. Atherholt in Support of Her Decertification Petition, *Dana Corp.*, 341 N.L.R.B. No. 150, 2004 WL 1329345 (2004).

Given such testimony, it is not surprising that this Court has recognized and condemned the abuses that often occur in the collection of union authorization cards. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 306 (1974). Nevertheless, the underlying purpose of these neutrality and card check agreements is to give unions broad access to all employees in order to perpetuate these abuses, and allow unions to force themselves upon even unwilling employees.

3) Waiver of secret-ballot election: Perhaps most egregiously, neutrality and card check agreements waive NLRB-supervised secret-ballot elections and substitute the "card check recognition" process, in which a signed authorization card counts as a "vote" for the union. Thus, the two most self-interested parties—the union that covets more dues payors and the employer that needs "labor peace"—prevent the employees from voting their consciences in private. Unions repeat the Orwellian mantra that "secret ballot elections are unfair,"[5] but experience shows that the process of soliciting union authorization cards relies upon coercion and misrepresentations, oftentimes with the complicity of the "neutral" employer. *Duane Reade, Inc.*, 338 N.L.R.B. No. 140, 2003 WL 1891062 (2003) ("neutral" employer unlawfully assisted union with organizing several of its stores, including forcing employees to sign authorization cards), *enforced*, 99 Fed. Appx. 240, 2004 WL 1238336 (D.C. Cir. 2004). Sometimes employees are threatened with bodily injury if they refuse to sign union cards. *See HCF, Inc.*, 321 N.L.R.B. 1320 (1996) (union militant warned an employee that if she didn't sign an authorization card "the union would come and get her children").

Ironically, the AFL-CIO argues that signature cards advocating *decertification* of a union "are not sufficiently reliable indicia of the employees' desires," and that already-unionized employees must resort to an NLRB-supervised secret-ballot election before they can remove the union. Brief of the AFL-CIO to the NLRB in *Chelsea Indus. & Levitz Furniture Co.*

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[5]The website of the recently merged Union of Needletrades, Textiles & Industrial Employees and Hotel Employees & Restaurant Employees International Union (UNITE HERE) claims that a "'card count neutrality agreement' . . . is . . . more democratic than an election." http://www.unitehere.org/about/organizing.asp#.

(May 18, 1998) (No. 7-CA-36846). Clearly, labor union officials are not advocating the "card check" process because they sincerely believe that cards or petitions reflect employee sentiment more reliably than a secret-ballot election. Rather, they advocate the card check process because they know that with it they can avoid secret-ballot elections and bring to bear enormous pressure on vulnerable employees to sign the cards.

Indeed, the union-controlled process of collecting signed authorization cards (akin to the "rule of the jungle") should be contrasted with the NLRB's longstanding rules governing the conduct of a secret-ballot election, for the contrast could not be more stark. In NLRB-supervised secret-ballot elections, even subtle pressures have been found to violate employee free choice under the "laboratory conditions" standard for representation proceedings. Those pressures need not rise to the level of an unfair labor practice to allow the Board to set aside the election result. *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948). But unions operating under neutrality and card check agreements often become exclusive bargaining representatives by engaging in intimidating actions that would preclude them from obtaining such status if committed during the course of a secret-ballot election.

For example, in a NLRB-supervised secret-ballot election, the following conduct has been held to upset the laboratory conditions necessary to guarantee employee free choice, thus requiring invalidation of the election: electioneering activities at the polling place;[6] prolonged conversations by representatives of a union or employer with prospective voters

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[6] *Alliance Ware, Inc.*, 92 N.L.R.B. 55 (1950); *Claussen Baking Co.*, 134 N.L.R.B. 111 (1961).

in the polling area;[7] electioneering among the lines of employees waiting to vote;[8] speechmaking by a union or employer to massed groups or captive audiences within twenty-four hours of the election;[9] a union or employer keeping a list of employees who vote as they enter the polling place (other than the official eligibility list);[10] and a union official handling a prospective voter's ballot.[11]

Such conduct disturbs the "laboratory conditions" necessary for employee free choice when it occurs during NLRB-supervised secret-ballot elections, yet it occurs in almost every card check drive. When an employee signs (or refuses to sign) a union authorization card, he or she is not likely to be alone. Indeed, it is likely that this decision is made in the presence of one or more union organizers soliciting the employee to sign a card. This solicitation could occur during or immediately after a union mass meeting or a company-paid captive audience speech, or it could occur in the employee's own home

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[7] *Milchem, Inc.*, 170 N.L.R.B. 362 (1968) ("The final minutes before an employee casts his vote should be his own, as free from interference as possible. Furthermore, the standard here applied insures that no party gains a last minute advantage over the other, and at the same time deprives neither party of any important access to the ear of the voter.").

[8] *Bio-Medical Applications*, 269 N.L.R.B. 827 (1984); *Pepsi Bottling Co.*, 291 N.L.R.B. 578 (1988).

[9] *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953).

[10] *Piggly-Wiggly*, 168 N.L.R.B. 792 (1967).

[11] *Fessler & Bowman, Inc.*, 341 N.L.R.B. No. 122, at 3, 2004 WL 1091057, at *4 (2004). In *Fessler*, the Board recognized the potential danger when a union official merely touched a prospective voter's ballot. On that basis the Board set aside an election and created prophylactic rules to ensure the integrity of the election process.

during an unsolicited union "home visit." In all cases the union handles the "ballot" of the prospective "voter." Finally, in all cases the employee's decision is not secret, as in an election, because the union has a master list of who has signed an authorization card and who has not.

Thus, a choice against signing a union card often does not end the decision-making process for an employee in the maw of a "card check campaign," but represents only the beginning of harassment and intimidation for that employee. This Court has already recognized this danger.

> We would be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue.

NLRB v. Gissel Packing Co., 395 U.S. 575, 604 (1969).

In sharp contrast to the abuses inherent in any "card check" campaign, each employee participating in a NLRB-conducted election makes his or her choice one time, in private. There is no one with the employee at the time of decision. The ultimate choice of the employee is secret from both the union and the employer. Once the employee has decided "yea or nay" by casting a ballot, the process is at an end.

Thus, only in an Orwellian world can HERE and the City of Pittsburgh claim that "we safeguard employee freedom by

doing away with the secret ballot election."[12] Certainly no Iraqi or Afghani who participated in those nations' historic elections would agree that a "card check" done in public is freer and fairer than a secret ballot election. In short, employee free choice and § 7 rights are not enhanced by the demise of the secret-ballot election and the total exclusion of the NLRB from the representational process. HERE and the City of Pittsburgh have no legitimate interest in forcing such terms upon unwilling employers and employees.

D. Neutrality and Card Check Agreements Are Not "Favored" by the Labor Laws So As to Excuse the Conduct of the City of Pittsburgh.

What is a typical hotel worker to think when confronted with this array of special privileges given by his or her employer to a single, anointed union? Surely it cannot be said that such neutrality and card check agreements enhance the employee's freedom to choose or reject a union. Thus, these agreements are not "favored" by federal labor policy, and this is especially true when they are mandated by a state or local government looking to tilt the playing field of labor relations in favor of union representation. *See Aeroground, Inc. v. City & County of San Francisco*, 170 F. Supp. 2d 950 (N.D. Cal. 2001); *Chamber of Commerce v. Lockyer*, 364 F.3d 1154 (9th Cir. 2004); *see also Dana Corp.*, 341 N.L.R.B. No. 150, 2004 WL 1329345 (2004); *Patterson v. Heartland Indus. Partners, LLP,* 225 F.R.D. 204 (N.D. Ohio 2004).

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[12]Unions do make this outrageous claim. For example, UNITE HERE's web-site asserts that a "'card count neutrality agreement' . . . is . . . more democratic than an election." http://www.unitehere.org/about/organizing.asp#.

To the contrary, federal labor policy favors robust debate. *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53 (1966) (Court applies constitutional protections to employees' speech as it relates to the statutory scheme of the NLRA); *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (protecting employees' right in the workplace setting to petition their legislators); *Lee v. NLRB*, 393 F.3d 491, 494-95 (4th Cir. 2005) (employees have the right under § 7 to refuse to wear union insignia on their work uniforms, even though the collective bargaining agreement mandates the wearing of such insignia). Federal labor policy does not favor enforced "gag orders" and other limits on free speech and the free exchange of ideas. *Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("The right . . . to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly.").

Similarly, federal labor policy favors free and fair secret-ballot elections, not "Potemkin village" card checks dressed up to look like elections. Although unions' self-interest dictates the elimination of the secret ballot, this Court and the NLRB have recognized "that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *Gissel Packing*, 395 U.S. at 602; *see also Dana Corp.*, 341 N.L.R.B. No. 150, 2004 WL 1329345 (2004).[13]

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[13]Congress is also looking to weigh in on this timely issue. On May 12, 2004, Rep. Charlie Norwood introduced H.R. 4343, the Secret Ballot Protection Act of 2004, to amend the NLRA to ensure the right of employees to a secret-ballot election conducted by the NLRB. This stands in sharp contrast to the proposed Employee Free Choice Act, legislation introduced by Sen. Ted Kennedy (S. 1925) and Rep. George Miller (H.R. 3619), that would essentially ban secret-ballot elections by mandating the acceptance of card checks.

In short, neither HERE nor the City of Pittsburgh can validly claim that federal labor policy "favors" the type of agreement at issue here. To the contrary, such collusive agreements hinder employees' § 7 rights and are to be soundly condemned because they conflict with the goals and policies of the NLRA. *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491 (1984) (state regulation of unions in the casino industry was lawful because the regulations did not conflict with the purposes and policies of the NLRA).

CONCLUSION

The Petition for Writ of Certiorari should be granted, and this case set for plenary consideration.

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